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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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PD-0799-19

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/5/2019
DEANA WILLIAMSON, CLERK

STATE OF TEXAS, Petitioner

vs.

SHEILA JO HARDIN, Respondent

Review sought from Cause No. 13-18-00244-CR, Thirteenth Court of Appeals, Corpus Christi, TX (Appeal from Cause No. 17FC-1760-G in the 319th Judicial District Court, Nueces County, Texas, the Hon. David Stith presiding)

RESPONDENT'S BRIEF

Respectfully submitted by:

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Supplement to State's Statement of Facts

Respondent provides a brief description of the testimony and video evidence.

Respondent's vehicle was traveling in the center of three lanes on a divided highway with no other traffic in sight on her side. SX 1. The passenger side rear tire of Appellee's vehicle begins straddling the lane divider around the 30 second mark, shortly after the vehicle rounded a curve. *Id.* The tire does not appear to entirely cross the lane divider. *Id.* The vehicle is not suddenly jerked back into the center lane; it continues on a smooth path, fully regaining the center lane around the 46 second mark. *Id.* Around the 53 second mark, the driver side rear tire nears the lane divider on the other side, but only just touches it, if it does at all. *Id.* Officer Alfaro immediately lights up at this point, and Appellee signals and moves into the right lane. *Id.* At 1:03 defendant begins entering a highway exit ramp and continues to gradually slow on the exit ramp, taking the turn at a safe speed. *Id.* No other vehicles appeared to be passing that exit ramp up to the time Officer Alfaro's vehicle turned far enough away to make visual contact with the highway uncertain. *Id.* about 1:19.

The trial court made a specific finding there was nothing to indicate this driving was unsafe. Supp. CR. 15 para. 1. It made a further finding that there was no evidence from which a person could reasonably suspect that Appellee's vehicle was involved in criminal activity. Supp. CR. 15 para. 2.

Summary of the Argument

Transportation Code section 545.060(a) is stated in the conjunctive. Standard interpretation of a statute stated in the conjunctive requires both prongs to be met for a violation to occur.

The Legislature is presumed to be aware of judicial interpretation of a statute. Long period of legislative inaction is evidence of legislature's approval of that interpretation. The courts of this State for two decades uniformly interpreted §545.060(a) to mean a violation occurs when an operator exits his lane and does so unsafely. The Legislature made no alteration to the statute during these two decades.

The trial court and the Court of Appeals followed long standing Texas precedent by applying the law as established in ruling the officer lacked reasonable suspicion to perform a traffic stop. This Honorable Court faced a nearly identical situation in *State v. Barnard*, and it refused the State's petition regarding whetehr the Fourteenth Court of Appeals erred by holding 545.060(a) is not violated without a showing of unsafe driving. *Barnard* was decided by this Honorable Court before the trial court ruled on the Motion to Suppress in this case and before the Thirteenth Court of Appeals issued its opinion. There should be no error found when a Court of Appeals follows long standing precedent on the heels of this Honorable Court refusing with prejudice to review an identical decision of a sister court.

ARGUMENT

The Court of Appeals correctly followed long standing precedent in affirming the decision of the trial court.

By a single issue, the State complains the Court of Appeals incorrectly held failure to maintain a single lane is not a violation of the law unless the act is also considered to be unsafe. As shown below, the Court of Appeal's decision was correct under the law at the time of the ruling by the trial court and the Court of Appeals. The trial court found there was nothing unsafe about the manner in which the vehicle was operated and there was no evidence from which a reasonable suspicion would arise that the vehicle was involved in any criminal activity. The trial court's findings have evidentiary support. Accordingly, this Honorable Court should affirm the ruling of the Court of Appeals or dismiss the petition as improvidently granted.

I. Briefly leaving a lane is not a per se violation of the Transportation Code.

This case concerns §545.060(a) of the Transportation Code which states:

(a) An operator on a roadway divided into two or more clearly marked lanes for traffic:

(1) shall drive as nearly as practical entirely within a single lane; and

(2) may not move from the lane unless that movement can be made

safely.

TEX. TRANSP. CODE ANN. §545.060(a). The question facing this court is whether the Thirteenth Court of Appeals erred by affirming the granting of a Motion to Suppress when the trial court found there was no reasonable suspicion of criminal activity to permit an officer to detain a vehicle for further investigation when the officer observed nothing unsafe about the manner in which an operator briefly overrode a lane dividing mark.

This Honorable Court demonstrated a previous division on the issue of whether the statute created one offense or two. *Leming v. State*, 493 S.W.3d 552 (Tex. Crim. App. 2016). Justice Yeary, joined by three other justices, was of the opinion the statute created two separate offenses, one for failing to maintain a single lane and one for changing lanes unsafely. *Leming v. State*, 493 S.W.3d at 556-560 (per Yeary, J., with three justices concurring). Justice Keasler, joined by two other justices, was of the opinion the statute creates just one offense which is violated when a person leaves a single lane unsafely. *Leming v. State*, 493 S.W.3d at 567-570 (Keasler, J., dissenting). Justice Acala joined other parts of the Court's opinion, which included an analysis of whether the arresting officer had reasonable suspicion to detain the motorist for DWI without recourse to §545.060(a). Justice Newell wrote a separate dissent but noted agreement with Justice Keasler on the interpretation of §545.060(a).

Respondent respectfully submits that the legislative intent in the statute is best understood by the legislature's use of the conjuctive "and" rather than the disjunctive "or," and the lack of a separate provision designating each phrase a separate offense. As Justice Keasler noted in his dissent in *Leming*, the Transportation Code contains other regulations stated in the conjunctive with the legislature then specifying that a violation of any of the elements constitutes an offense. *See, e.g.,* TEX. TRANSP. CODE §555.021.

Prior to this Honorable Court's writing in *Leming*, the Courts of Appeals were uniform in holding §545.060(a) to be a single statute violated only when a person drifted out of his or her lane in an unsafe manner. *Hernandez v. State*, 983 S.W.2d 867 (Tex. App.–Austin 1998, pet. ref'd).

The Legislature is presumed to be aware of the courts' interpretations of its statutes. In the nineteen years between *Hernandez v. State*, and Respondent's arrest, the Legislature made no change to §545.060. Prolonged legislative inaction after judicial interpretation of a statute implies legislative approval of that interpretation. *State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007). While this principle is usually reserved for the situation in which the court of last resort has spoken on the issue, the principle should apply in the situation in which the intermediate courts have unanimously spoken on the issue over two decades.

The Courts of Appeals uniformly followed the lead of the Third Court of Appeals in construing 545.060 to require a showing of lack of safety before a violation is found. The following Courts of Appeals specifically have ruled a defendant was entitled to have a motion to suppress granted when there was no evidence the operator's action was unsafe:

Second Court of Appeals – *State v. Houghton*, 384 S.W.3d 441 (Tex. App. – Fort Worth 2012, no pet.)

Fourth Court of Appeals – *State v. Arriaga*, 5 S.W.3d 804 (Tex. App. – San Antonio 1999, pet ref'd)

Sixth Court of Appeals – *Corbin v. State*, 33 S.W.3d 90 (Tex. App.–Texarkana 2000), rev'd on other grounds, *Corbin v. State*, 85 S.W.3d 272 (Tex. Crim. App. 2002)

Eleventh Court of Appeals – *State v. Johnson*, Cause No. 11-13-00150-CR (Tex. App.–Tyler 2014, no pet.)

Thirteenth Court of Appeals – *State v. Cerny*, 28 S.W.3d 796, 800 (Tex. App.—Corpus Christi 2000, no pet.)

Fourteenth Court of Appeals – *Aviles v. State*, 23 S.W.3d 74 (Tex. App.–Houston [14th Dist.] 2000, pet ref'd).

In short, the Legislature has been made fully aware that the Courts of Appeals

are uniformly construing §545.060(a) as a single offense requiring a showing of exiting the lane and doing so in an unsafe manner, yet it has taken no action to alter the language of the statute since the Third Court of Appeals made its ruling in *Hernamdez*.

Furthermore, a statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case, including an element of offense or the penalty to be imposed. TEX. GOV'T CODE §. 311.035.

Accordingly, the Thirteenth Court of Appeals correctly interpreted the Transportation Code and did not err when it affirmed the trial court's ruling on the State's Motion to Suppress.

II. This Honorable Court previously refused with prejudice an argument that the Leming plurality opinion requires courts to ignore their precedent that unsafe driving is required to show a violation of section 545.060.

The State argues the Thirteenth Court of Appeals should have overturned its long standing precedent by applying the rationale of the plurality of this Honorable Court in *Leming*. Respondent must point out that this Honorable Court had the perfect opportunity to apply the plurality rationale to a case from the Fourteenth Court of Appeals, but it not only declined to do so, it refused the State's issue with

prejudice.

The Fourteenth Court of Appeals was asked to review the granting of a motion to suppress in a case in which the driver was seen "swerving from lane to lane and even going into the center lane." *State v. Bernard*, 503 S.W.3d 685, 687 (Tex. App.–Houston [14th Dist.] 2016), *rev'd on other grounds*, 512 S.W.3d 351 (Tex. Crim. App. 2017). The trial court issued findings of fact that included:

> • Watson testified Bernard's vehicle went outside his lane of travel twice and that his vehicle's tires did not cross the line very far, but about 3 feet or less;
>
> • Watson testified there was nothing unsafe about Albert Bernard's driving;
>
> • There was no other traffic around Bernard while he was maintaining or failing to maintain a single lane;
>
> * * *
>
> • Manuel viewed the dash cam video and testified that Bernard's vehicle only crossed 6-to-8 inches over the lane divider at one point, and approximately 4 inches at another point. He further testified that in viewing the dash cam video that it appeared to him that Bernard was mostly just "drifting" from side to side within his own lane; and
>
> • Manuel testified Bernard's vehicle did not interfere with any other traffic, and that his driving was not unsafe.

Id. at 689.

The Fourteenth Court of Appeals affirmed, stating that it followed its own

precedent in requiring a showing of unsafe driving to establish a violation of section 545.060. *Id.* at 691 (citing *Eichler*, 117 S.W.3d at 900–01 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (interpreting Section 545.060 in accordance with *Hernandez*). The Fourteenth Court of Appeals then acknowledged the plurality opinion in *Leming* but said:

> Plurality opinions, however, do not constitute binding authority. *Vasquez v. State*, 389 S.W.3d 361, 370 (Tex. Crim. App. 2012) (plurality opinion has no binding precedential value). Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court. *Medina v. State*, 411 S.W.3d 15, 20 n.5 (Tex. App.–Houston [14th Dist.] 2013, no pet.). Accordingly, *Eichler* controls. *See* 117 S.W.3d at 900–01.

Id. at 691.

This Honorable Court then took up the case, but rather than reverse the Fourteenth Court of Appeals on the basis that the plurality decision in *Leming* controlled the case, it reversed only the ground that the Fourteenth Court of Appeals should address the issue regarding whether there was reasonable suspicion to believe the defendant in that case was intoxicated. *State v. Bernard*, 512 S.W.3d 351, 352 (Tex. Crim. App. 2017). The State had also raised the issue of whether the Court of Appeals incorrectly ruled on the section 545.060 issue, but this Honorable Court refused that issue with prejudice. *Id*. Thus, not only did this Honorable Court reject

the opportunity to instruct the various courts of appeals to apply the *Leming* plurality reasoning despite previous court specific precedent, it barred the State from relitigating the issue after remand.

This case is indistinguishable from *Bernard* on the issue of the proper interpretation of section 545.060, its application to the facts of the case, and the procedural position of the case. The trial courts in both cases made specific findings of a lack of evidence to show any unsafe driving or any other evidence to show a reasonable suspicion of any criminal activity. Supp. CR. 15. The Courts of Appeals in both cases noted the plurality opinion in *Leming* and followed their own precedent that a lane violation did not create reasonable suspicion to detain a motorist absent evidence that maneuver was unsafe.

The chronology of events in the case at bar and the rulings of this Honorable Court on this issue is highly instructive. This Honorable Court had already refused a State's petition with prejudice on identical grounds by the time the trial court in this case followed the reasoning of the 14th Court of Appeals. The trial court and Court of Appeals followed that rationale in ruling on the motion to suppress in this case. If this Honorable Court were to now hold the courts below erred by following the lead of the Fourteenth Court of Appeals, then trial courts and courts of appeals would be (at best) confused about how to respond in the future in the event this Honorable

Court issues a plurality opinion.

III. Conclusion

The Thirteenth Court of Appeals and the trial court below it did nothing more than follow two decades of precedent concerning §545.060(a), and the courts made their rulings after this Honorable Court already refused the State's petition in *Barnard*. Respondent respectfully submits this Honorable Court should either refuse the State's Petition for Discretionary Review or dismiss it as improvidently granted.

Prayer

Respondent respectfully requests this Honorable Court to decide the petition was improvidently granted in this case. Alternatively, Respondent respectfully requests this Honorable Court to overrule the State's issues and affirm the decision of the Court of Appeals.

Respectfully submitted,

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Certificate of Service and Compliance

I, Donald B. Edwards, certify that a copy of this brief is being delivered on November 4, 2019, via the state electronic filing system to Mr. Doug Norman at his email address of douglas.norman@nuecesco.com and to Ms. Stacey Soules at her office office email address of information@spa.texas.gov .

I further certify this document complies with the length requirements in that it contains 2440 words in matters not exempted under Rule 9.4. I rely on the

computer word processing program in determining this figure. I further certify that this document was created in 14 point Times New Roman type font by Corel Word Perfect and converted to pdf format.

/s/ *Donald B. Edwards*

Donald B. Edwards